

93

IN THE HIGH COURT OF KIRIBATI
CIVIL JURISDICTION
HELD AT BETIO
REPUBLIC OF KIRIBATI

1
1
1
1

HIGH COURT CIVIL CASE 128 OF 2010

BETWEEN: MIKAERE AREE PLAINTIFF

AND: ATTORNEY GENERAL IRO COMMISSIONER OF POLICE DEFENDANT

BEFORE: THE HON SIR JOHN MURIA CJ

MS BOTIKA MAITINNARA FOR THE PLAINTIFF
MS TAAIRA TIMEON FOR THE DEFENDANT

DATE OF HEARING: 29 APRIL 2011

JUDGMENT

WRIT – Employment – Police officer employed in the Government Service – Served in police force for 29 years – Reached retirement age – Continued in service after retirement – Rights and entitlements of employee during continuation of service – National Conditions of Service (NCS) – Letter of Notice of end of employment – Obligation of employer to repatriate employee to home islands – Whether employer fulfilled repatriation obligation – Whether entitled to subsistence allowance or subsistence expenses while awaiting repatriation – Whether entitled to payment in lieu of notice.

Muria CJ: By a Writ dated 28 September 2010 and issued out of the High Court, the plaintiff Mikaere Aree claims damages in the sum of \$480.00 being one month salary in lieu of two months' notice, subsistence

allowance of \$45.00 per day from 2 August 2010 until the day the plaintiff is repatriated from Butaritari Island to Makin Island, and costs.

Brief Background

2. The plaintiff joined the Kiribati Police Force on 3 April 1981 as a Police Constable and served in Tarawa as well as in the outer islands police stations. In 2005 he was promoted to the rank of Corporal at a fortnightly net salary of \$240.00.

3. In June 2009, the plaintiff was transferred from Onotoa to Butaritari Island holding the post of an Officer in Charge. He was serving at Butaritari Island police station until he was served with a notice that his service "will come to an end" effective as from 2 August 2010. That notice is contained in a letter dated 29 July 2010 issued by the Office of Commissioner of Police (see Exhibit 3). The plaintiff received that letter the next day, on 30 July 2010. He also received his last pay on the same date, 30 July 2010.

5. Following the receipt of the letter of "**Notice of last day of employment**" the plaintiff, obviously unhappy, took the matter up with those responsible in the Police Department. His claims for subsistence allowance and repatriation costs have not yet been resolved. His family is still in Butaritari waiting to be repatriated back to Makin Island, their home island.

6. The plaintiff was born in 25 February 1959. His retirement age of 50 years fell on 25 February 2009. The defendant issued to the plaintiff notice of end of employment, effective as of 2 August 2010 which was 17 months, 1 week and 2 days beyond his 50th birthday.

The Plaintiff's Claim

7. The plaintiff's claim is two-fold, namely the sum of \$480.00, one month's salary in lieu of two months' notice and \$45.00 per day subsistence allowance until his repatriation to his home island, Makin. The basis for claiming the one month's salary is said to be under **Condition C.1(a) of the National Conditions of Service (NCS)**. I will deal with this provision later in this judgment. For now, let me just set out the terms of the provision which provides as follows:-

"C.1

(a) The appointment of a permanent employee may be terminated at any time by giving him two months' notice in writing or by paying him one month's salary in lieu.

8. On his claim for \$45.00 per day subsistence allowance, the plaintiff grounds his case on what he calls "a running rate" for subsistence allowance paid to civil servants who are transferred to outer islands on duty. This claim is vehemently opposed by the defendant.

9. The plaintiff also claims that the defendant is obliged to repatriate him and his family back to their home island at defendant's expense. There seems to be no dispute to that aspect of his claim. The plaintiff also claims damages for the period waiting to be repatriated.

The Defendant's Case

10. The case for the defendant as put by Counsel is that the plaintiff's conditions of service are governed by the NCS. It is said that under NCS,

the plaintiff's circumstances do not entitle him to subsistence allowance nor damages in the form of one (1) month's salary.

11. The defendant strenuously argued that plaintiff had already reached retirement age and as such his employment simply ended. That says the defendant is not a termination of employment which attracts notice or payment in lieu of notice.

12. As to the plaintiff's claim for repatriation costs, the defendant says that payment for the plaintiff's and his family's repatriation has already been arranged and paid for. There is no dispute as to the defendant's obligation to repatriate the plaintiff and his family back to their home island, Makin. The defendant disputes the plaintiff's claim for damages for the period waiting to be repatriated.

Issues

13. The obligation of the defendant to repatriate the plaintiff and his family back to their home island is a non-issue in this case. The defendant is obliged to do so. The issue is whether the defendant had carried out its obligation to repatriate the plaintiff and his family.

14. The second issue which arises from the facts of this case is whether the plaintiff is entitled to subsistence allowance of \$45.00 per day while awaiting repatriation. Call it subsistence allowance or something else, the plaintiff's claim under this head is, in fact, the cost of maintaining himself and his family in Butaritari while waiting to be repatriated. Thus the third issue: is he entitled to the cost of maintaining himself and family while awaiting repatriation?

15. The fourth issue involves the claim by the plaintiff of one (1) month's pay in lieu of notice.

The Law and Determination

16. The issues raised are of importance to the plaintiff, as well as those whose employment is governed by the NCS. I deal with the issues raised in the order set out above.

(i) Repatriation

17. Understandably, Counsel for the defendant did not seek to argue otherwise of the defendant's obligation to repatriate the plaintiff and his family back to their home at Makin Island. Counsel, however, sought to persuade the Court to accept that the defendant had already met its obligation to repatriate the plaintiff and his family in this case.

18. Consonant with its obligation under the law, the defendant has also ensured that provisions are made in the NCS regarding repatriation of government employees. One such provision is **Condition H.15** which provides for an employee's entitlement to be transported to his home island on completion of his service. It provides:

"H.15 An employee travelling on retirement or on termination of appointment other than on dismissal, and on completion of contract, is entitled to transport for himself, his wife and all of his children from place of duty to his home island in the class appropriate to his post provided the passages are taken up within six months".

19. Again the NCS provides in **Condition E.45** for the eligibility of an employee to have his baggage transported to his home island at Government expense on retirement. It provides:

E.45 On retirement: an employee proceeding by sea on retirement or on leave pending retirement at Government expenses will be eligible to take with him at Government expense up to 600 cu. ft. of effects. To qualify for this allowance, transport of baggage must take place within six months of the employee's last day of duty.

20. I need also refer to another provision of NCS on this matter, namely **Condition C.10** which provides as follows:

C.10 (i) Except where statutory provisions otherwise provide, an employee must retire on reaching the age of 50 years. No employee may continue in service after reaching the age of 50 years except on reappointment on contract terms or on temporary terms only for the purpose of awaiting repatriation. (Underlining is mine).

(ii) Cabinet, in its meeting 29/01 (2) of 13/9/01, has decided that as a policy for retiring officers, a permanent employee who has satisfactorily served Government up to the official retirement age including any authorised extension and has to be repatriated back to his home island, his terms of appointment is allowed to continue working and to continue occupying a Government housing until the first available transport to his home island is ready (*PSO Memo No. 291/01*). (Underlining is mine).

21. The above provisions of the NCS clearly demonstrate the defendant's obligation to repatriate the plaintiff and his family back to their home at Makin Island. But as I have said, the defendant does not dispute this obligation.

22. Has the defendant fulfill his obligation in this case? The undisputed fact of the matter is that the plaintiff and his family are presently still at Butaritari waiting to be repatriated. This is the position despite the evidence tendered in Court of a Local Purchase Order (LPO), a Payment Voucher (PV) and an Invoice, all dated 2 November 2010 and showed air

passages for the plaintiff and his family had been raised and issued. Sadly, because of the manner in which the evidence was led, it has never been established whether the air tickets had actually been purchased nor was there any evidence to show that the plaintiff ever received the air tickets at all. As I have said, the fact remains that the plaintiff is still waiting at Butaritari with his family to be transported back to their home on Makin Island.

23. The only conclusion that can be made is that the defendant has not yet fulfilled his obligation to provide transportation for the plaintiff, his wife and all of his children to their home island on completion of his service to the defendant. It is therefore proper that an order must be made in this regard that the defendant immediately pay the cost of transporting the plaintiff and his family from Butaritari back to their home at Makin Island, as provided for under **Condition H.15 of NCS**.

24. There is some suggestion in argument that the plaintiff had not utilized the entitlement within the six months as stated in **Condition H.15** and so he cannot avail this entitlement. This suggestion does not merit any consideration, when the con-compliance with the rules falls squarely on the shoulder of the defendant.

(ii) Subsistence Allowance

25. The plaintiff's claim for subsistence allowance while waiting for repatriation has met strong resistance from Ms Timeon of Counsel for the defendant. Counsel stated **Conditions E.34 and E.36(a)** of the NCS do not confer any entitlement to subsistence allowance to the plaintiff. The terms of the two provisions state as follows:

E.34 Subsistence allowance is payable in respect of each period of 24 hours necessarily spent on duty away from an employee's station up to a maximum of 30 days, except that the Secretary (PSD) may approve payments of subsistence allowance in excess of 30 days.

E.36 (a) With effect from 1/1/96;

(i) An employee travelling on duty within Kiribati may be paid a daily subsistence allowance of \$45.00 per day if staying in a council Rest House or any recognised and registered hotels.

26. I accept the submission by Ms Timeon in this regard. An employee who has reached retirement age or has been terminated and has ceased employment is not entitled to subsistence allowance under conditions E.34 and E.36 of NCS. This is because such an employee has ceased employment and therefore he is no longer "on duty". The plaintiff in this case, having continued his service after reaching retirement age, was terminated on 2 August 2010. As from that date he ceased to be "on duty" and so he would not be entitled to subsistence allowance under **Conditions E.34 and E.36** of NCS.

(III) **What, if anything, is the plaintiff entitled to?**

27. I turn to **Condition C.10** of NCS already referred to above again. That provision requires that an employee must retire at age 50 years. There is, however, an option created and couched in the negative language enabling an employee to "**continue in service**" beyond 50 years of age only "**on reappointment ---- or on temporary terms only for the purpose of awaiting repatriation**". Obviously, only the defendant can allow or authorize an employee to continue in service. The employee cannot permit himself to do that.

28. The staunch stand taken by Counsel for the defendant that the plaintiff is not entitled to anything else apart from the costs of the air tickets (which were never issued to the plaintiff) for Butaritari to Makin, is obviously at variance with the policy issued by the Government in 2001 and added as paragraph (ii) of **Condition C.10** of NCS. The Government, in my view, very fittingly recognizes and acknowledges the dedicated services of officers in the Government Service by permitting "authorized extension" of a permanent employee's **"terms of appointment... to continue.... until the first available transport to his home island is ready"**.

29. In the present case, the plaintiff's 50th birthday fell on 25 February 2009. I have no doubt that the record of his personal details are contained in his Personal File, and kept in the defendant's possession. This was confirmed in the defendant's letter dated 29 July 2010 – Notice of last day of Employment – where it was acknowledged that **"According to our official records, your date of birth falls on the 25th February 1959...."** and as such he had already reached retirement age on 25 February 2009.

30. Here, the plaintiff had reached retirement age on 25 February 2009, and he was allowed to **"continue in service"** since then. He was not on reappointment on contract terms or on temporary terms for the purpose of awaiting repatriation. He was simply allowed to continue in service full time under the same terms and conditions of service after 25 February 2009. What is the effect of his continuation in service?

31. Both Counsel for the plaintiff and defendant did not address this point which, to my mind, is crucial in this case. The plaintiff's case is that he is entitled to be repatriated at Government expense, plus one month's salary in lieu of notice and "allowance" of \$45.00 per day until he is repatriated. The defendant's case is that the plaintiff had already

reached retirement age on 25 February 2009 and therefore he is not entitled to anything, save perhaps the cost of repatriation back to Makin Island. I have to say, that the defendant's case is virtually trounced by their acceptance of the plaintiff to continue in service after he attained retirement age on 25 February 2009.

32. An employee who, having reached retirement age, is allowed to continue in service after retirement age on the same terms and conditions of service as previously enjoyed is generally entitled to the same rights conferred under those terms and conditions. I say, 'generally', because those rights can be modified if the defendant expressly chooses to allow the employee to continue in service by "**reappointment on contract terms or on temporary terms only for the purpose of awaiting repatriation**" as provided for under **Condition C.10(i)** of the NCS.

33. While I found that the plaintiff is not entitled to subsistence allowance in this case, because he is not "**on duty**" away from his station, he is, in my judgment entitled to damages by way of compensation for the period he spends waiting to be repatriated to his home island.¹¹ His salary ceased on the same date he received the notice of termination. However, the defendant's obligation to repatriate him back to his home island has not been fulfilled. That obligation must include the cost of travelling and subsistence expenses from Butaritari to Makin Island, as well as subsistence expenses while waiting to be repatriated starting from date of termination to date of repatriation. ^{or red unpay}

34. The delay in the plaintiff's repatriation is not of his making. The defendant stated that they would assist him and his family to get back to their home. He was entitled to rely on the words from his superiors, including ASP Atantaake Tooma, that they would take the necessary

action to facilitate his claim. The argument by Counsel for the defendant that the promise or assurance by ASP Atantaake Tooma does not form part of any written and binding term of contract of service between the defendant the plaintiff, is irrelevant when the defendant has the obligation to fulfill his part of the bargain/contract.

35. In the circumstances, the plaintiff is entitled to subsistence expenses as stated above. There seems to be no dispute as to the figure \$45.00 and so an order must be made that the plaintiff is entitled to the sum of \$45.00 per day as subsistence expenses from 2 August 2010 to the date the plaintiff and his family are repatriated back to their home at Makin Island.

(iv) Notice of Termination

36. In the present case, the defendant, having known of the retirement age of the plaintiff, allowed him to continue in service after reaching retirement age under his normal terms and conditions of service previously enjoyed. In those circumstances the plaintiff is entitled to same rights as other employees including rights conferred by statutes and in contract, in particular, his entitlements under the NCS, one of which is the right to be given proper notice before termination.

37. The plaintiff having had his employment continued after reaching retirement age was terminated by a letter dated 29 July 2010 which he received on 30 July 2010 advising him that his employment ceased on 2 August 2010. That notice was clearly in breach of **Condition C.1** of NCS which states:

"C.1 The appointment of a permanent employee may be terminated at any time by giving him two months' notice in writing or by paying him one month's salary in lieu".


38. The plaintiff is entitled to two months' notice or one month's salary in lieu of notice and I so hold. Accordingly the plaintiff succeeds on his claim for notice pay, and there will be an order that the defendant pays the plaintiff the sum of \$480.00 as claimed and representing one month's salary.

39. It follows that the plaintiff's claim succeeds and judgment issued in his favour. His costs must also be paid to him.

ORDER: Judgment for the plaintiff with the following orders made:

- (1) Defendant to pay costs of repatriating plaintiff and family back to Makin Island without further delay.**
- (2) Defendant shall pay \$480.00 (one month's salary in lieu of notice) to plaintiff;**
- (3) Defendant to pay subsistence expenses to the plaintiff and his family at rate of \$45.00 per day from 2 August 2010 until date of repatriation.**
- (4) Costs to the plaintiff.**

Dated the 20th day of May 2011


SIR JOHN MURIA
Chief Justice